

Rules and Regulations Implementing the  
Telephone Consumer Protection Act of 1991

)  
) Docket Nos. CG 02-278, DA 05-1346,  
) DA 05-1347, DA 04-3185, DA 04-3187,  
) DA 04-3835, DA 04-3836, DA 04-3837,  
) DA 05-342  
)

Comments of the Electronic Privacy Information Center, Junkbusters, Consumer Action,  
National Consumers League, PrivacyRightsNow Coalition, Privacy Rights Clearinghouse, World  
Privacy Forum, PrivacyActivism, Privacy Journal, Consumer Federation of America,  
Commercial Alert, and the National Consumer Law Center

July 29, 2005

Pursuant to the notice published by the Federal Communications Commission  
(Commission) on June 29, 2005 regarding the notice of proposed rulemaking and the petition for  
declaratory ruling on the Rules and Regulations Implementing the Telephone Consumer  
Protection Act of 1991 (TCPA), the Electronic Privacy Information Center, Junkbusters,  
Consumer Action, National Consumers League, PrivacyRightsNow Coalition, Privacy Rights  
Clearinghouse, World Privacy Forum, PrivacyActivism, Privacy Journal, Consumer Federation  
of America, Commercial Alert, and the National Consumer Law Center submit the following  
comments.<sup>1</sup>

## **I. Introduction**

The Commission should deny the Joint Petitioners' request to preempt state anti-  
telemarketing laws. Petitioners have not met the burden of showing that Congress acted with a  
"clear and manifest purpose"<sup>2</sup> to preempt state laws. In fact, Congress had no such intent in

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<sup>1</sup> Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, 70 Fed. Reg. 37318 (June 29, 2005); Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, 70 Fed. Reg. 37317 (June 29, 2005).

<sup>2</sup> See *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977) (internal quotation marks omitted) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).

passing the TCPA. Instead, Congress has repeatedly passed up the opportunity to explicitly preempt state anti-telemarketing laws. The TCPA sets a uniform floor of protections that all Americans enjoy, which may be supplemented by stronger state laws.

State anti-telemarketing laws should be preserved. These laws were enacted by state legislators, employing the state police power to protect individuals from abusive calling practices. These laws represent innovation in addressing quickly-evolving business practices and recognize regional needs that may not rise to the attention of federal regulators.

Americans owe the highly successful Telemarketing Do-Not-Call Registry to such state innovation. The Do-Not-Call Registry is just of many consumer privacy protections that have been developed by state legislatures and later adopted at the federal level by Congress or an administrative agency. Consumers will continue to be served best by a dual regulation system that allows state responses to marketing practices.

## **II. In Passing the TCPA, Congress Did Not Demonstrate an Intent to Preempt State Laws**

### *A. In order to supersede the state laws at issue, Petitioners must demonstrate a "clear and manifest" intent by Congress to preempt state laws*

Petitioners have not met the burden of establishing a "clear and manifest"<sup>3</sup> congressional intent to preempt state anti-telemarketing laws. While Congress may preempt state law either explicitly or implicitly,<sup>4</sup> it has done neither in the TCPA.

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<sup>3</sup> *Id.*

<sup>4</sup> See *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 98 (1992) (quoting *Rath Packing Co.*, 430 U.S. at 525).

1. State regulation of interstate telemarketing is not expressly preempted by the TCPA

The TCPA does not expressly preempt state anti-telemarketing laws. While it specifically preserves state authority over intrastate telemarketing,<sup>5</sup> it is silent on preemption of state regulation of interstate telemarketing. Because the statute does not contain clear language preventing states from regulating interstate telemarketing calls, state regulation of such calls is not explicitly preempted.

2. State regulation of interstate telemarketing is not implicitly preempted by the TCPA

While Congress may also preempt state law implicitly, it has not done so in the TCPA.

The Supreme Court has held:

In the absence of an express statement by Congress that state law is pre-empted, there are two other bases for finding pre-emption. First, when Congress intends that a federal law occupy a given field, state law in that field is pre-empted. Second, even if Congress has not occupied the field, state law is nevertheless pre-empted to the extent it actually conflicts with federal law, that is, when compliance with both state and federal law is impossible, or when the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.<sup>6</sup>

Neither of these forms of preemption, "field" or "conflict," justifies invalidation of the state anti-telemarketing laws at issue.

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<sup>5</sup> Telephone Consumer Protection Act, 47 U.S.C. § 227(e)(1) (2005).

<sup>6</sup> *Cal. v. ARC America Corp.*, 490 U.S. 93, 100-01 (1989) (internal quotation marks and citations omitted) (citing *Pacific Gas & Elec. Co. v. State Energy Res. Conservation and Dev. Comm'n*, 461 U.S. 190, 212-13 (1983) and *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963), quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

- a. Congress did not intend to prohibit the states from regulating in the field of telemarketing

By enacting the TCPA, Congress did not intend to prohibit state regulation in the field of telemarketing. To determine whether Congress has preempted the states from regulating within the field covered by the legislation, "[t]he [] inquiry is whether Congress, pursuant to its power to regulate commerce ... has prohibited state regulation of the particular aspects of commerce involved in [the] case."<sup>7</sup> If the field that Congress is said to have preempted is one that has traditionally been occupied by the states, it is presumed that "the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress."<sup>8</sup>

Petitioners erroneously contend that the Commission has exclusive authority over interstate telemarketing. Petitioners start from the premise that the Communications Act of 1934 granted the Commission jurisdiction over "all interstate and foreign communication by wire or radio" and over "all persons engaged ... in such communication."<sup>9</sup> However, though the Commission has jurisdiction over all interstate *communication*, it does not follow that the Commission has jurisdiction over all interstate *telemarketing*. Telemarketing cannot be classified as communication alone; there is an overwhelming element of advertising or solicitation. The telephone is merely a vehicle for delivering advertising to consumers. Because businesses use the telephone to solicit sales, the interest in consumer protection, an interest long protected by the states, is triggered. Petitioners' argument that Congress considers telemarketing

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<sup>7</sup> *Jones v. Rath Packing Co* 430 U.S. at 525 (1977).

<sup>8</sup> *Id.* (internal quotations omitted) (quoting *Rice*, 331 U.S. at 230).

<sup>9</sup> Communications Act of 1934, 47 U.S.C. § 152(a) (2005).

regulation to be "a species of telecommunications regulation,"<sup>10</sup> is unfounded. Petitioners' justifications for this argument are that, in enacting the TCPA, Congress (1) placed the provisions regulating telemarketing in Title II of the Communications Act and (2) amended section 2(b) of the Communications Act to give the Commission jurisdiction over both interstate and intrastate telemarketing calls.<sup>11</sup> Neither of these justifications provides evidence that Congress considers telemarketing to be classified solely, or otherwise, as communication.

Indeed, the telemarketing industry has attempted to make analogous arguments regarding the FTC's authority to regulate telemarketing, but failed.<sup>12</sup> The court found that the fact that the FCC has jurisdiction to regulate predictive dialers does not mean that the FTC lacks jurisdiction to regulate in the same area because "We live in an 'era of overlapping agency jurisdiction under different statutory mandates.'"<sup>13</sup> The court found that Congress gave the FTC express authority to regulate abusive and deceptive telemarketing fraud.<sup>14</sup>

Because telemarketing implicates consumer protection, an area long regulated by the states,<sup>15</sup> the Commission must begin with the assumption that state laws regulating telemarketing were not to be preempted, unless Congress clearly intended preemption.<sup>16</sup> There is no evidence of congressional intent to prohibit state laws regulating telemarketing.

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<sup>10</sup> See Joint Petition for Declaratory Ruling that the FCC has Exclusive Regulatory Jurisdiction over Interstate Telemarketing, *In the Matter of Alliance Contact Servs., et al.* 3, CG Docket No. 02-278 (filed Apr. 29, 2005) [hereinafter Joint Petition].

<sup>11</sup> *Id.* n.6.

<sup>12</sup> See *Mainstream Marketing Services, Inc. v. FTC*, 283 F.Supp.2d 1151, 1169-1170 (2003), *rev'd in part on other grounds*, 358 F.3d 1228 (10th Cir. 2004).

<sup>13</sup> *Id.* at 1169 (cite omitted).

<sup>14</sup> *Id.*

<sup>15</sup> *Cal. v. ARC America Corp.*, 490 U.S. 93, 101 (1989).

<sup>16</sup> *Jones v. Rath Packing Co.* 430 U.S. at 525 (1977)(quoting *Rice*, 331 U.S. at 230).

The Eighth Circuit found the TCPA savings clause that expressly preserves more restrictive state telemarketing laws “makes it clear that Congress did not intend to “occupy the field of [automatic dialing-announcing devices] regulation.”<sup>17</sup>

b. State laws regulating interstate telemarketing do not conflict with the federal TCPA

State laws regulating interstate telemarketing do not conflict with the TCPA. The Supreme Court has stated that “[c]ongressional enactments that do not exclude all state legislation in the same field nevertheless override state laws with which they conflict.”<sup>18</sup> Such conflict preemption requires either a finding that compliance with both the federal and state law is impossible or a finding that the state law is an obstacle to the accomplishment of congressional objectives.<sup>19</sup>

i. Compliance with both state and federal law is not impossible

Compliance with state anti-telemarketing laws does not make it impossible for telemarketers to comply with the federal TCPA. Any additional cost or preparation that is necessary prior to calling residents of a given state does not interfere with a business' compliance with the more lenient TCPA. There is “nothing in the [statutes at issue] that creates a situation in which an individual cannot comply with a [state] statute without violating [the federal statute].”<sup>20</sup> In general, telemarketers need only comply with state anti-telemarketing laws, which do not

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<sup>17</sup> *Van Bergen v. State of Minn.*, 59 F.3d 1541, 1547-1548 (8th Cir. 1995).

<sup>18</sup> *Jones v. Rath Packing Co.* 430 U.S. at 525-26 (1977).

<sup>19</sup> *See Cal. v. ARC America Corp.*, 490 U.S. at 100-01 (1989).

<sup>20</sup> *Van Bergen v. State of Minn.*, 59 F.3d 1541, 1548 (8th Cir. 1995).

contradict the TCPA or its implementing regulations, in order to act in accordance with both state and federal law. In fact, Joint Petitioners and other telemarketers have lived under a dual federal-state regulatory scheme for fifteen years. This is clear evidence that compliance with both state and federal law is not impossible. Further, as demonstrated *infra*, the sophisticated calling technology used today by telemarketers makes compliance with varying state laws easier now than ever.

- ii. State laws regulating interstate telemarketing do not stand as obstacles to accomplishing the congressional objectives set forth in the TCPA

State laws regulating interstate telemarketing are not obstacles to the accomplishment of the objectives of Congress as set forth in the TCPA. The fact that a state law may differ in certain technical regards with the TCPA does not lead to the conclusion that state laws are in conflict with the federal law. The Supreme Court has stated that the "task is to determine whether, under the circumstances of this particular case, the State's law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."<sup>21</sup> The purposes of the state anti-telemarketing laws and the federal TCPA are the same – to protect consumers against an invasion of privacy.

Congressional intent is the critical factor in preemption analysis.<sup>22</sup> In interpreting a preemption clause, a court "must give effect to [its] plain language unless there is good reason to believe Congress intended the language to have some more restrictive meaning."<sup>23</sup> Though

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<sup>21</sup> *Jones v. Rath Packing Co.* 430 U.S. at 526 (1977)(internal quotation marks omitted) (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

<sup>22</sup> *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516; *see also Am. Bankers Ass'n v. Gould*, 2005 U.S. App. LEXIS 11760 at \*11 (9th Cir. June 20, 2005).

<sup>23</sup> *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 97 (1983); *see also* 2005 U.S. App. LEXIS 11760 at \*10-11.

Congress did not explicitly state a purpose or an objective in the TCPA, a number of congressional findings led to the passage of and were included in the TCPA. Congress found:

(5) Unrestricted telemarketing ... can be an intrusive invasion of privacy ...

...

(7) Over half the States now have statutes restricting various uses of the telephone for marketing, but telemarketers can evade their prohibitions through interstate operations; therefore, Federal law is needed to control residential telemarketing practices.

...

(9) Individuals' privacy rights, public safety interests, and commercial freedoms of speech and trade must be balanced in a way that protects the privacy of individuals and permits legitimate telemarketing practices.

(10) Evidence compiled by the Congress indicates that residential telephone subscribers consider automated or prerecorded telephone calls, regardless of the content or the initiator of the message, to be a nuisance and an invasion of privacy.

...

(12) Banning such automated or prerecorded telephone calls to the home, except when the receiving party consents to receiving the call or when such calls are necessary in an emergency situation affecting the health and safety of the consumer, is the only effective means of protecting telephone consumers from this nuisance and privacy invasion.<sup>24</sup>

Congress' findings clearly emphasize the need to protect consumers from an invasion of their privacy. Because the TCPA was passed to address this significant need, protecting consumers' privacy was the clear purpose of the statute.

Nowhere in its findings does Congress recognize the need to create "uniform national standards," as argued by Joint Petitioners.<sup>25</sup> Petitioners' assertion that Congress' principal objectives in enacting the TCPA were "to establish uniform national standards that balance the concerns of consumers with the legitimate interests of telemarketers"<sup>26</sup> is erroneous. First, Congress demonstrated no intent to establish uniform standards. The word "uniform" does not appear either in the congressional findings or the text of the TCPA. The word "national" appears

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<sup>24</sup> Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, §2, 105 Stat. 2394.

<sup>25</sup> See Joint Petition, *supra* note 10, at i.

<sup>26</sup> See Joint Petition, *supra* note 10, at 7.



only as related to the permission granted to the Commission to establish a national Do-Not-Call Registry. Second, Congress was less concerned about the legitimate practices of telemarketers than it was about the privacy interests of consumers. In only one of fifteen findings does Congress mention the need to "permit legitimate telemarketing practices."<sup>27</sup> In contrast, Congress emphasizes the need to protect consumers' right to privacy in nine of the findings.<sup>28</sup> More importantly, Congress asserts that

*[b]anning such automated or prerecorded telephone calls to the home, except when the receiving party consents to receiving the call or when such calls are necessary in an emergency situation affecting the health and safety of the consumer, is the only effective means of protecting telephone consumers from this nuisance and privacy invasion.*<sup>29</sup>

This language clearly indicates that automated and prerecorded telephone calls are not allowed unless the consumer consents or the call is necessary in an emergency. Clearly Congress does not consider automated or prerecorded calls made without consent to be among the legitimate telemarketing practices to be permitted.

Courts in several jurisdictions have concluded, after thorough analysis of the legislation, that the purpose of the TCPA was to protect consumer privacy.<sup>30</sup> In addition, the Eighth Circuit has confirmed the lack of congressional intent to preempt state laws. In *Van Bergen v. State of Minnesota*,<sup>31</sup> the Eighth Circuit Court of Appeals decidedly ruled out preemption of state law under the TCPA. It emphasized, "If Congress intended to preempt other state laws, that intent

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<sup>27</sup> Telephone Consumer Protection Act §2(9).

<sup>28</sup> *Id.* at § 2(5)-(7), (9)-(14).

<sup>29</sup> *Id.* at § 2(12) (emphasis added).

<sup>30</sup> See, e.g., *Int'l Sci. & Tech. Inst. v. Inacom Commc'ns, Inc.*, 106 F.2d 1146, 1150 (4th Cir. 1997); *Park Univ. Enters. v. Am. Cas. Co. of Reading, Pa.*, 314 F. Supp. 2d 1094, 1109 (D.Kan. 2004); *Registry Dallas Assocs. v. Wausau Bus. Ins. Co.*, 2004 U.S. Dist. LEXIS 5771, at \*16 (N.D.Tex. Feb. 26, 2004); *TIG Ins. Co. v. Dallas Basketball, Ltd.*, 129 S.W.3d 232, 238 (Tex. App.-Dallas 2004); *Universal Underwriters Ins. Co. v. Lou Fusz Auto. Network*, 300 F. Supp. 2d 888, 894-95 (E.D.Mo. 2004); *Am. States Ins. Co. v. Capital Assocs. of Jackson County, Inc.*, 2003 U.S. Dist. LEXIS 25532, at \*19 (S.D.Ill. Dec. 9, 2003); *Hooters of Augusta, Inc. v. Am. Global Ins. Co.*, 272 F. Supp. 2d 1365, 1373 (S.D.Ga. 2003); *W. Rim Inv. Advisors, Inc. v. Gulf Ins. Co.*, 269 F. Supp. 2d 836, 847 (N.D.Tex 2003); *Prime TV, LLC v. Travelers Ins. Co.*, 223 F. Supp. 2d 744, 752-53 (M.D.N.C. 2002).

<sup>31</sup> 59 F.3d 1541 (8th Cir. 1995).

could easily have been expressed as part of the same provision."<sup>32</sup> This is especially persuasive because more than twenty-five states had anti-telemarketing laws at the time the TCPA was enacted.<sup>33</sup> Congress, being aware of the existence state anti-telemarketing laws, would have preempted such laws if that had been its intent. Congressional finding (7), above – "Over half the States now have statutes restricting various uses of the telephone for marketing, but telemarketers can evade their prohibitions through interstate operations; therefore, Federal law is needed to control residential telemarketing practices" – recognizes these state anti-telemarketing laws. Moreover, this finding contemplates that federal law will work alongside state law to make the state laws more meaningful and effective. Indeed, the *Van Bergen* court found that "[t]his finding suggests that the TCPA was intended not to supplant state law, but to provide interstitial law preventing evasion of state law by calling across state lines."<sup>34</sup> Furthermore, if Congress had intended to create a "uniform" regulatory scheme, it would not have expressly precluded preemption of state regulation in one area of telemarketing – intrastate telemarketing.

Because state laws regulating interstate telemarketing and the TCPA share the same purpose – protecting consumers from an invasion of privacy – the state laws do not stand as obstacles to the accomplishment of congressional objectives.

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<sup>32</sup> *Id.* at 1548.

<sup>33</sup> Telephone Consumer Protection Act of 1991 §2(7). These states include Florida, Kansas, Louisiana, Minnesota, New Mexico, New York, Oregon, and Texas. *See* 1987 Fla. Laws ch. 253; Kan. Stat. Ann. § 50-670 (2005) (enacted in 1991); La. Rev. Stat. Ann. § 45:810 (2005) (enacted in 1991); Minn. Stat. § 325E.26 (2004) (enacted in 1987); N.M. Stat. § 57-12-22 (2005) (enacted in 1989); N.Y. Gen. Bus. Law § 399-p (2005) (enacted in 1988); Or. Rev. Stat. § 646.563 (2003) (enacted in 1989); Tenn. Code Ann. § 47-18-1501 (2004) (enacted in 1990).

<sup>34</sup> *Van Bergen v. State of Minn.*, 59 F.3d 1541, 1548 (8th Cir. 1995).

*B. Petitioners cannot overcome the strong legal presumption against preemption of state law*

1. Petitioners have not overcome the strong legal presumption against preemption of state law

The Supreme Court has repeatedly emphasized the strong legal presumption against preemption of state law.<sup>35</sup> Because petitioners have not been able to rebut this presumption, the Commission should not invalidate the state laws at issue. The Supreme Court has cited "the oft-repeated rule that the State, in the absence of express action by Congress, may regulate many matters which indirectly affect interstate commerce, but which are for the comfort and convenience of its citizens."<sup>36</sup> The Court has further stated that "[o]f the existence of such a rule there can be no question. It is settled and illustrated by many cases."<sup>37</sup> In addition, the Court has emphasized that "interstate commerce in its practical conduct has many incidents having varying degrees of connection with it and effect upon it over which the State may have some power."<sup>38</sup>

2. The presumption against preemption is especially strong in this case, because Petitioners seek to invalidate laws related to the historical state police power

The presumption against preemption of state law is especially strong as related to the state police power, an area traditionally regulated by the states.<sup>39</sup> The Supreme Court has held that where "the field which Congress is said to have pre-empted has been traditionally occupied by the states, we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of

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<sup>35</sup> See *Missouri Pac. Ry. Co. v. Larabee Flour Mills Corp.*, 211 U.S. 612 (1908); *Southern Ry. Co. v. Reid*, 222 U.S. 424, 425 (1911).

<sup>36</sup> *Missouri Pac. Ry. Co. v. Larabee Flour Mills Corp.*, 211 U.S. 612 at 621 (1908).

<sup>37</sup> *Id.*

<sup>38</sup> *Southern Ry. Co. v. Reid*, 222 U.S. 424 at 434 (1911).

<sup>39</sup> See *Jones v. Rath Packing Co.*, 430 U.S. 519 (1977); *Cal. v. ARC America Corp.*, 490 U.S. 93, 94 (1989).

Congress."<sup>40</sup> Consumer protection is part of the state police power,<sup>41</sup> and thus it enjoys the heightened presumption against preemption of state law. The Supreme Court has stated, "Given the long history of state common-law and statutory remedies against monopolies and unfair business practices, it is plain that this is an area traditionally regulated by the States."<sup>42</sup>

*C. The Commission must interpret the TCPA in a reasonable manner; it is unreasonable to read preemption of state anti-telemarketing laws into the TCPA*

The Commission must interpret the TCPA in a reasonable manner. The Commission's interpretation of the statute is governed by *Chevron v. Natural Resources Defense Council*.<sup>43</sup> Under *Chevron*, if Congress' intent is clear from the statute, the Commission must follow the expressed intent of Congress. If, however, the statute is silent or ambiguous with respect to the issue at hand, the agency must interpret the statute in a reasonable manner. At best, the TCPA preemption provision is ambiguous as to whether state regulation of interstate telemarketing is permitted.

The Commission has acknowledged that the preemption provision of the TCPA is at most ambiguous as to whether the Commission is prohibited from preempting state laws that regulate both intrastate and interstate calls.<sup>44</sup> Further, the Commission has recognized that the provision is silent on the issue of whether a state law that imposes more restrictive regulations on interstate

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<sup>40</sup> *Jones v. Rath Packing Co.* 430 U.S. at 525 (1977)(internal quotation marks omitted) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).

<sup>41</sup> *Cal. v. ARC America Corp.*, 490 U.S. at 101 (1989); *Cedar Rapids Cellular Telephone v. Miller*, 280 F.3d 874, 880 (8th Cir. 2002). See also, *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 475 (1996) ("[T]he States traditionally have had great latitude under their police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons", quoting *Metro. Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 756 (1985)).

<sup>42</sup> *Cal. v. ARC America Corp.*, 490 U.S. at 94-95 (1989).

<sup>43</sup> 467 U.S. 837 (1984).

<sup>44</sup> FCC Report and Order, *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991* 50 (adopted June 26, 2003, released July 3, 2003) [hereinafter FCC Report and Order].

telemarketing calls may be preempted.<sup>45</sup> The Commission has nevertheless indicated that "more restrictive efforts to regulate interstate calling would almost certainly conflict with [its] rules."<sup>46</sup> However, the primary justification given for this assertion is that the Commission believes it was the "clear intent" of Congress to "promote a uniform regulatory scheme under which telemarketers would not be subject to multiple, conflicting regulations."<sup>47</sup> Again, there is no mention of such a scheme in the text of the TCPA, nor does the statute even use the word "uniform." The authority cited by the Commission for this "clear intent" is a single remark of one member of Congress, Senator Larry Pressler, on the floor of the Senate.<sup>48</sup> However, read in context, the statement made by Senator Pressler during discussion of the TCPA – "The Federal Government needs to act now on uniform legislation to protect consumers" – merely summarizes the message of the testimony that was received by the Senate Commerce, Science, and Transportation Committee on S. 1410, an anti-telemarketing bill introduced by Pressler but never enacted.<sup>49</sup> Further, Pressler's next comments were, "The primary purpose of [the TCPA] is to develop the necessary ground rules for cost-effective protection of consumers from unwanted telephone solicitations."<sup>50</sup> The emphasis of Senator Pressler's remarks is clearly on the protection of consumers' privacy rights. Pressler makes no further comment on what "uniform legislation" would entail, and whether the notion even relates to the balance of power between the Commission and the states. The Commission's assertion of Congress' interest in "uniformity" is not supported by the legislative history of the TCPA. Basing this assertion on the remarks of a single Senator is not persuasive; reading the remarks in context reveals that this authority is even less persuasive.

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<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at 50-51.

<sup>48</sup> *Id.* at 51, n.268.

<sup>49</sup> 137 Cong. Rec. S18317 (1991).

<sup>50</sup> *Id.*

Others have proposed that any call for uniformity does not relate to the allocation of jurisdiction between federal and state governments, but instead relates to a congressional mandate that the Commission and another federal agency, the Federal Trade Commission, coordinate their efforts and design one federal Do-Not-Call Registry.<sup>51</sup>

Furthermore, in the Commission's own interpretation of the TCPA, the Commission has indicated that the objective of the TCPA is "to address a growing number of telephone marketing calls and certain telemarketing practices thought to be an invasion of consumer privacy and even a risk to public safety."<sup>52</sup>

The Commission may act only as authorized by Congress, and it must interpret Congress' actions in a reasonable manner. It would be unreasonable and outside the Commission's authority to read into the TCPA a broad intent to preempt state law.<sup>53</sup>

### **III. State Laws Regulating Interstate Telemarketing Calls Should Not Be Preempted by Federal Law**

Not only are state anti-telemarketing laws not prohibited by the TCPA as a legal matter, as a policy matter, such laws should not be preempted.

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<sup>51</sup> See, e.g., Comments of the Wisconsin Attorney General in Support of their Motion to Dismiss Petition of the Consumer Bankers Association on Grounds of Sovereign Immunity, *In the Matter of Consumer Bankers Ass'n* 9, CG Docket No. 02-278.

<sup>52</sup> FCC Report and Order, *supra* note 44, at 5.

<sup>53</sup> See *LA PSC v. FCC*, 476 US 335, 374 (1986)(an agency may not confer power upon itself; to do so would expand its power to override Congress).

*A. Telemarketing companies are deliberately and knowingly targeting out-of-state residents*

Telemarketers are both deliberately and knowingly using marketing techniques that target out-of-state residents. In targeting residents of other states, they must comply with consumer protection laws in the call recipient's state.

Telemarketers should be held to the same standards that apply to other direct marketers. When a company engages in other forms of direct marketing, such as catalog sales, it is required to comply with all applicable state laws, including differing state sales taxes, product labeling requirements, and product bans. Telemarketers should have to comply in similar ways.

*B. Consumers are best served when both state and federal officials can work to protect them against unlawful business practices*

Consumers are best protected against unlawful business practices by a combination of federal and state laws. The federal government simply cannot accommodate the diverse interests and needs that are served by state consumer protection laws. For instance, in July 2005, DMNews<sup>54</sup> reported on a telemarketing ban implemented by Louisiana in response to a storm.<sup>55</sup> In that State, an emergency powers law permits the government to temporarily suspend telemarketing operations during an emergency. This type of state response to a public emergency cannot practicably be performed by the federal government. The value of state law and the limits of federal power to respond to such emergencies are clear.

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<sup>54</sup> DMNews is an online newspaper for direct marketers. DMNews Home Page, <http://www.dmnews.com>.

<sup>55</sup> Scott Hovanyetz, *Emergency Triggers Louisiana Telemarketing Ban*, DMNews, July 7, 2005.

*C. The traditional role of the states in regulating privacy should be preserved*

States have a traditional role in regulating privacy that should be preserved. There is a presumption in American law that state and local governments are primarily responsible for matters of health and safety.<sup>56</sup> Privacy is included in the category of health and safety issues, as an area of regulation historically left to the states.<sup>57</sup> Further, the Commission has recognized that "states have a long history of regulating telemarketing practices."<sup>58</sup>

*D. Historically, most privacy law allows states to provide greater protections*

Federal consumer protection and privacy laws, as a general matter, operate as regulatory baselines and do not prevent states from enacting and enforcing stronger state statutes. The Electronic Communications Privacy Act,<sup>59</sup> the Right to Financial Privacy Act,<sup>60</sup> the Cable Communications Privacy Act,<sup>61</sup> the Video Privacy Protection Act,<sup>62</sup> the Employee Polygraph Protection Act,<sup>63</sup> the Driver's Privacy Protection Act,<sup>64</sup> the Health Insurance Portability and Accountability Act,<sup>65</sup> the Gramm-Leach-Bliley Act,<sup>66</sup> and portions of the Fair Credit Reporting

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<sup>56</sup> *Hillsborough County v. Automated Med. Labs.*, 471 U.S. 707, 716 (1985) (there is a "presumption that state and local regulation of health and safety matters can constitutionally coexist with federal regulation.").

<sup>57</sup> *See, e.g., Hill v. Colo.*, 530 U.S. 703 (2000) (upholding a law protecting the privacy and autonomy of individuals seeking medical care, as the law was intended to serve the "traditional exercise of the States' police power to protect the health and safety of their citizens.") (internal quotation marks omitted).

<sup>58</sup> FCC Report and Order, *supra* note 44, at 46.

<sup>59</sup> 18 U.S.C. § 2710(f) (2005).

<sup>60</sup> 12 U.S.C. § 3401 (2005). While the Right to Financial Privacy Act does not contain explicit provisions regarding its effect on state law, the legislative history of the Act indicates that Congress intended to regulate access to customer records by federal agencies and departments only, without precluding states from regulating access of state and local agencies to such records.

<sup>61</sup> 47 U.S.C. § 551(g) (2005).

<sup>62</sup> 18 U.S.C. § 2710(f) (2005).

<sup>63</sup> 29 U.S.C. § 2009 (2005).

<sup>64</sup> 18 U.S.C. § 2721 (2005).

<sup>65</sup> 29 U.S.C. § 1191 (2005).

<sup>66</sup> 15 U.S.C. § 6701 (2005).



Act<sup>67</sup> all allow states to craft protections that exceed federal law. In each of the areas regulated by the above-referenced privacy laws, business has continued to flourish in states that have enacted privacy protections that are stronger than the federal law.

*E. Permitting state anti-telemarketing laws promotes regulatory innovation and experimentation*

Permitting states to regulate interstate telemarketing will continue to promote regulatory innovation and experimentation. As Justice Brandeis once remarked, "It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."<sup>68</sup> States enjoy a unique perspective that allows them to craft innovative programs to protect consumers. State legislators are closer to their constituents and the entities they regulate. They are the first to see trends and problems, and are well-suited to address new challenges and opportunities that arise from evolving technologies and business practices. State-level policy experimentation fosters the development of best practices.

Federal preemption can dilute more vigorous protections and policy debates that occur at the state level. In a detailed study of caller ID policy approaches, Roopali Mukherjee and Rohan Samarajiva found that the Commission's position was much weaker than those developed by the states:

...the FCC's rules deviated from the dominant trend state by state PUCs.  
Moreover, the FCC's rules pre-empted stronger protections effective in 37 states by that time...

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<sup>67</sup> 15 U.S.C. § 1681t (2005).

<sup>68</sup> *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (Brandeis, J., dissenting).

...It appears that the FCC was effectively insulated from the emulation and learning processes at work at the state level...The FCC's record on telecommunications privacy issues is minimal. Outflow [of personal information] concerns, in particular, have received little or no attention. Where privacy concerns have been raised, the FCC has consistently overridden them with concerns regarding competition. Decisions on Customer proprietary Network Information (CPNI) and Automatic Number Identification (ANI) exemplify the FCC's stance...

...while the majority of state regulators moved to higher-privacy solutions by 1994, the FCC stayed with per-call blocking. This suggests that emulation and learning did not take place at the federal level. FCC Commissioners and staff were unlikely to have been heavily involved in policy networks in which state regulators participated quite vigorously. In the absence of learning from state-level networks, the FCC remained unconvinced about outflow concerns, and thereby with higher-privacy solutions.<sup>69</sup>

An entire appendix to the 1977 report of the Privacy Protection Study Commission<sup>70</sup> entitled *Personal Privacy in an Information Society*<sup>71</sup> was devoted to "Privacy Law in the States." This portion of the report speaks strongly to the value of state privacy protection:

Through constitutional, statutory, and common law protections, and through independent studies, the 50 States have taken steps to protect the privacy interests of individuals in many different types of records that others maintain about them. More often than not, actions taken by State legislatures, and by State courts, have been more innovative and far reaching than similar actions at the Federal level ... the states have also shown an acute appreciation of the need to balance privacy interests against other social values.<sup>72</sup>

The report emphasized "the central role the States can play as protectors of personal privacy, and more broadly, individual liberty"<sup>73</sup>: "The States have demonstrated that they can, and do, provide

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<sup>69</sup> Roopali Mukherjee and Rohan Samarajiva, *Regulating "Caller ID": Emulation and Learning in US State-Level Telecommunication Policy Processes*, 7 Telecomm. Pol'y 531-542 (1996).

<sup>70</sup> The Privacy Protection Study Commission was created by the Privacy Act of 1974. Privacy Act of 1974, Pub. L. 93-579 § 5, 88 Stat. 1896 (codified as amended at 5 U.S.C. § 552(a)).

<sup>71</sup> Privacy Protection Study Commission, *Personal Privacy in an Information Society* (1977), available at <http://www.epic.org/privacy/ppsc1977report/>.

<sup>72</sup> *Id.* app.1 at Preface.

<sup>73</sup> *Id.* at 27.

conditions for experiments that preserve and enhance the interests of the individual in our technological, information-dependent society."<sup>74</sup>

State laws are often later adopted at the federal level. Indeed, states have taken the lead in developing and enforcing legislative safeguards for consumer protection and privacy. At least thirty-six states had passed do-not-call statutes prior to implementation of the federal Do-Not-Call Registry in 2003.<sup>75</sup> The Joint Petitioners' proposal is contrary to the core principles of our federalist system. Preemption of state anti-telemarketing laws would inhibit the development of best practices by individual states and significantly undermine the country's traditional structure of consumer protection.

*F. State legislators and law enforcers are more accountable to the public interest*

State and local governments are more accountable than the federal government to their constituents. As a result, it is likely that stronger protections will emerge from state and local legislatures, and that more vigorous enforcement will be pursued by state actors. In addition, the Commission has limited resources for enforcement; states should share this responsibility. In fact, the Commission has recognized that "it is critical to combine the resources and expertise of the state and federal governments to ensure compliance with the national do-not-call rules."<sup>76</sup> With limited enforcement, consumer protection and privacy laws will have little effect.

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<sup>74</sup> *Id.*

<sup>75</sup> FCC Report and Order, *supra* note 44, at 11.

<sup>76</sup> FCC Report and Order, *supra* note 44, at 46.

G. *Businesses are not put at a disadvantage by having to comply with differing state laws*

Telemarketing companies are not put at a disadvantage by having to comply with differing state laws. Especially in the financial services and credit reporting areas, many businesses have argued that a national ceiling of laws is needed in order to prevent "balkanization" or a "patchwork" of state laws.<sup>77</sup> As the National Association of Attorneys General Privacy Subcommittee has observed,

Many businesses ... argue the importance of a single, federal standard by citing the need for uniformity. They assert that a 'patchwork' of state laws will make compliance costly and may stifle the development of markets both on and offline. In fact, businesses have long accommodated themselves to a range of state consumer protection statutes while maintaining a profitable enterprise. Courts have, for years, engaged in a process of reconciling potentially or actually conflicting laws through application of established legal principles to various factual situations. Such a tailored response is especially appropriate with respect to evolving technologies and new applications of those technologies. This flexible approach accommodates the needs of both businesses and consumers, while preserving state sovereignty in an area where states have traditionally had a significant role.<sup>78</sup>

There is nothing that differentiates businesses that engage in telemarketing from other industries that operate at the national level with varying state laws. For instance, the insurance industry is not regulated at the federal level and is subject to varying legal requirements in the states. Yet the insurance industry has thrived under this system of regulation.

One of the main goals of this campaign to preempt state laws is to override state laws that prevent telemarketers from employing the established business relationship exception. This exception allows businesses to call their current customers up to 18 months after providing a product or service to the customer.

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<sup>77</sup> See, e.g., The National Association of Attorneys General Privacy Subcommittee, *Privacy Principles and Background*, available at <http://www.naag.org/naag/resolutions/subreport.php>.

<sup>78</sup> *Id.*

Any marketing barriers created by state laws apply equally to those with and without an existing business relationship with registered telephone subscribers. Just because a consumer has purchased goods or services from a business in the past, does not mean that the consumer wishes to hear from that business again through telemarketing. In fact, by registering for the national Do-Not-Call Registry, many consumers have expressly indicated that they do not wish to hear from such businesses. In addition, there are many other means for businesses to contact customers with whom they have an established relationship, such as direct mail and communication with customers at its place of business, including in-store displays.<sup>79</sup> The benefit to a consumer of not receiving telemarketing calls far outweighs the cost to businesses that would like to engage in such telemarketing. Petitioners have not demonstrated that state anti-telemarketing laws have been an inconvenience to the legitimate operations of the direct marketing industry.

*H. Modern profiling technology demonstrates that compliance with the laws of multiple jurisdictions is possible*

1. Petitioners have not demonstrated that the dual federal-state regulatory system, which has worked successfully for almost fifteen years, is in need of change

Petitioners have not successfully made the case that preemption is now needed. Though Petitioners argue that compliance with differing state laws is too burdensome, they have lived under this dual federal-state regulatory system for fifteen years. If this system were really so burdensome, the telemarketing industry would have, and should have, objected to the system long ago.

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<sup>79</sup> See e.g., State of Indiana's Reply Comments, *In the Matter of Consumer Bankers Ass'n* 5, CG Docket No. 02-278.

The dual regulatory system has been successful for over a decade. Telemarketing rose in prominence and had to be curtailed by regulation not because of complexity in compliance, but rather because of overzealous practices that made necessary the Telemarketing Do-Not-Call Registry and restrictions on autodialers. The Petitioners' arguments, viewed in context of almost fifteen years of compliance with varying state laws, appear to be motivated more by political opportunity than legal impossibility.

2. New technologies make compliance with state laws easier now than in any time in history

New technologies make it easier for telemarketers today to comply with differing state laws. Interstate commerce did not begin with the Internet. Businesses have long had to comply with varying state laws as a condition of doing business within a state. And today, with sophisticated location technology and consumer profiling, the direct marketing industry is better equipped than ever to comply with varying state laws. The need for uniformity is an overvalued idea that does not account for the industry's ability to treat different people differently – at least when there is a profit motive involved.

The same technologies that have enabled customer profiling and segmentation could enable compliance with different state laws. Direct marketers speak breathlessly about their ability to "segment" the public, that is, to treat different people differently. These companies will go to great lengths to divide people into different groups and pitch varying advertising messages to them. For instance, commercial data broker Acxiom released a new customer profiling system in June 2005. As it was described: "Personicx ANSWERS gives users more immediate access to data for marketing planning and analysis. Personicx places each U.S. household in one of 70

segments, or clusters, and 21 life-stage groups based on behavior and demographic characteristics."<sup>80</sup> In addition, Claritas' PRIZM system has been used to profile American consumers for decades, and currently consists of a "62-cluster version of PRIZM and the 95-atom MicroVision system at the ZIP+4 level."<sup>81</sup> These two companies categorize individuals on issues much more nuanced than the state in which they live – these categories concern lifestyle, income, and personal attitudes.


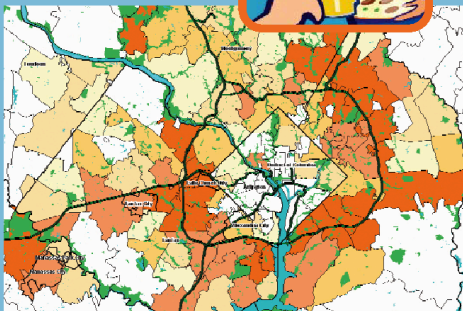
Direct marketers' own advertising literature shows that the industry can even categorize people at the zip code level. In a brochure discussing the segmentation ability of data broker Claritas, the company demonstrates how it can easily identify "young urban professionals" across three jurisdictions.<sup>82</sup> The brochure shows an analysis performed at the zip code level of "Young Influentials," a group that reflects "the fading glow of acquisitive yuppiedom."

## CHALLENGE:

**Young urban professionals are still around and still a highly desirable target market. But what's the best way to find them?**

**SOLUTION:** PRIZM NE classifies young urban professionals as "Young Influentials." Young Influentials reflect the fading glow of acquisitive yuppiedom. Today, the segment is a common address for young, middle-class singles and couples who are preoccupied with balancing work and leisure. Having recently left college dorms, they now live in apartment complexes surrounded by ball fields, health clubs and casual-dining restaurants.

The map to the right shows the Washington, D.C. area by ZIP code, shaded by the concentration of Young Influentials. Being a suburban segment, there are few in the city, but PRIZM NE has identified a concentration in the inner-ring suburbs of Prince Georges County, MD, and Northern Virginia, where Young Influentials congregate in townhomes and apartments clustered around the busy interchanges of the Capital Beltway.

<sup>80</sup> Kristen Bremner, *Axiom Debuts Segmentation, Credit Tools*, DMNews, June 29, 2005, at [http://www.dmnews.com/cgi-bin/artprevbot.cgi?article\\_id=33220&dest=article](http://www.dmnews.com/cgi-bin/artprevbot.cgi?article_id=33220&dest=article).

<sup>81</sup> Claritas, *Segmentation Analysis*, available at <http://www.clusterbigip1.claritas.com/claritas/Default.jsp?main=3&submenu=seg&subcat=segpirmne> (last visited July 2, 2005).

<sup>82</sup> Claritas advertisement, available at [http://www.clusterbigip1.claritas.com/claritas/pdf/articles/Claritas\\_STORES\\_Aug\\_2004.pdf](http://www.clusterbigip1.claritas.com/claritas/pdf/articles/Claritas_STORES_Aug_2004.pdf) (last visited July 6, 2005).

Claritas' systems can locate yuppie "concentration[s] in the inner-ring suburbs of Prince George[']s County, MD, and Northern Virginia." If Claritas can discriminate on this level based on so many factors, direct marketers should be called upon to explain why this same technology cannot enable compliance with state law.<sup>83</sup>

In addition, a simple search on Petitioner American Teleservices Association's (ATA) supplier page returns a variety of companies that specialize in compliance with the very laws that ATA claims are so burdensome.<sup>84</sup> For instance, Call Compliance, Inc. advertises that its "multi-award-winning TeleBlock® Do-Not-Call Blocking System is the first and only blocking product that automatically screens and blocks outbound calls in real-time against federal, state, wireless, third party and in-house Do-Not-Call lists."<sup>85</sup>

In fact, next to the ATA's talking points that urge telemarketers to contact the Commission in support of preemption, the organization advertises a regulatory guide to comply with state laws.<sup>86</sup> The advertisement, an "animated gif," reads:

"ATA American Teleservices Association REGULATORY GUIDE  
"DO-NOT-CALL made simple  
"All State & Federal Rules Online  
"Includes Email Alerts  
"Click here for more information"

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<sup>83</sup> See Claritas advertisement, *available at* [http://www.clusterbigip1.claritas.com/claritas/pdf/articles/Claritas\\_STORES\\_Aug\\_2004.pdf](http://www.clusterbigip1.claritas.com/claritas/pdf/articles/Claritas_STORES_Aug_2004.pdf).

<sup>84</sup> See American Teleservices Association, Find a Supplier, <http://forms.ataconnect.org/servlet/com.ebiz.edge.webform.FindASupplier>.

<sup>85</sup> See Call Compliance Home Page, <http://www.callcompliance.com/>.

<sup>86</sup> See American Teleservices Association, Government Affairs, <http://www.ataconnect.org/GovernmentAffairs/jurisdiction.htm>.



This regulatory guide proclaims that it makes compliance with state laws simple.<sup>87</sup>

Welcome to the Online Regulatory Guide<sup>SM</sup>, the essential reference tool for any company that makes solicitations over the phone. Without it, the complex maze of laws and regulations impacting your business is virtually impossible to navigate. By taking advantage of the Regulatory Guide<sup>SM</sup> you will receive up-to-the-minute email alerts of new bills and regulations impacting the teleservices industry, and access to regularly updated information on all of the following critical topics:

## Do-Not-Call made simple.

- Definitions of Key Terms
- Registration Information
- Registration Exemptions
- Calling Time Restrictions
- DNC Registration Information
- DNC Exemptions
- DNC Safe Harbor Rules
- Business Relationship Defined
- Solicitation Disclosure
- Purchase Rules
- "No Rebuttal" Rules
- Autodialer Rules

It is a:

one-stop, online source...[that has an]...easy-to-follow menu-driven format [that] allows you to click on a pertinent issue, pertinent text from the statute or regulation itself...essential when assessing the finer points of a problem.... Most guides are industry or state specific, with none providing a complete picture of the constantly changing regulations governing the entire telemarketing industry. With many companies operating regionally, across several states or nationally, the guide is an invaluable work-saver. You'll no longer have to waste valuable calling time jumping to, or searching for, different sites or publications to ensure that all rules are being adhered to when calling into a new area.<sup>88</sup>

<sup>87</sup> See American Teleservices Association, New 2005 Online Regulatory Guide, <http://ata.regulatoryguide.com/myeln/ata.asp>.

<sup>88</sup> *Id.*

Similarly, on Petitioner Direct Marketing Association's supplier page, one can find dozens of companies specializing in telemarketing services.<sup>89</sup> One, Creative Compliance, Inc., even includes on its web site a case study in which the company brought a 2,000-location telemarketing enterprise into compliance with federal and state laws.<sup>90</sup>

From a technical perspective, coding in different time of call, established business relationship, or permission to continue laws is trivial. Markers can be placed in the database to highlight individuals who reside in states with stricter telemarketing laws, and telemarketers could be instructed not to call, or to call these individuals at specific times or in compliance with specific rules.

In the past, telemarketing groups bemoaned many aspects of the Telemarketing Sales Rule (TSR) changes, complaining that compliance with mandates, such as the 3% abandoned call rate, was impossible. However, while they complained, other companies were advertising compliance systems in direct marketing trade publications. Today, companies are complying with the TSR mandates, despite the professions of impossibility so strenuously made two years ago.

The Commission should view claims for a need for uniformity with much greater skepticism. New tools make it easier now than ever to treat people differently. The industry should bear the burden of explaining how on one hand it can give different people who live on the same block different credit card offers, but it cannot treat people who live in different states differently when it comes to telemarketing regulations.

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<sup>89</sup> See Direct Marketing Association Yellow Pages, <http://www.the-dma.org/yellowpages/>.

<sup>90</sup> See Creative Compliance, Case Histories, <http://www.creativecompliance.com/cases.html>.

*I. State residents support state telemarketing laws*

Many state legislatures have determined that their residents have a strong interest in privacy and have consequently promulgated laws regulating telemarketing. These states have adopted legislation that preserves the right of those who want to receive telemarketing calls to do so, while safeguarding the privacy interests of those consumers who are not interested in receiving such calls. Joint Petitioners now seek to eviscerate these statutory safeguards and to substitute their own judgment about who should receive telemarketing calls.

State residents have grown accustomed to the protections offered by their respective states. Many residents oppose imposition of an existing business relationship exemption, as this would contravene their desire to avoid telemarketing by enrolling in the Do-Not-Call Registry.<sup>91</sup> Requiring states to follow the federal model, which includes allowing telemarketing calls to existing customers, would eliminate the residential peace that state residents have come to enjoy. Such a requirement would contravene the overall goal of the Commission's Do-Not-Call Registry – protecting consumers from the invasion of privacy resulting from telemarketing calls.

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<sup>91</sup> See, e.g., State of Indiana's Reply Comments, *supra* note 79, at 4.

#### **IV. Conclusion**

Based on the foregoing, the Commission should expressly declare that the TCPA does not preempt state laws regulating telemarketing.

Respectfully submitted,

Chris Jay Hoofnagle  
Director and Senior Counsel  
Electronic Privacy Information Center  
West Coast Office

Jessica Shannon  
Law Clerk  
Electronic Privacy Information Center

Jason Catlett  
Founder  
Junkbusters

Ken McEldowney  
Director  
Consumer Action

Susan Grant  
Vice President, Public Policy  
National Consumers League

Linda Ackerman  
Staff Counsel  
PrivacyActivism

Beth Givens  
Director  
Privacy Rights Clearinghouse

Remar Sutton  
Co-founder  
PrivacyRightsNow Coalition

Pam Dixon  
Director  
World Privacy Forum

Robert Ellis Smith  
Publisher  
Privacy Journal

Jean Ann Fox  
Director of Consumer Protection  
Consumer Federation of America

Gary Ruskin  
Director  
Commercial Alert

Olivia B. Wein  
Staff Attorney  
National Consumer Law Center